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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(El Dorado)

THE PEOPLE,

Plaintiff and Respondent,

v.

LARRY FRANK ENYART,

Defendant and Appellant.

C086776

(Super. Ct. No. P17CRF0088)

Following a jury trial, defendant Larry Frank Enyart was convicted of criminal threats (Pen. Code, § 422)¹ and assault with a deadly weapon (§ 245, subd. (a)(1)). The trial court suspended imposition of sentence and placed defendant on five years of formal probation.

On appeal, defendant contends that (1) the trial court prejudicially erred in excluding medical records of the complaining witness, (2) the prosecutor committed

¹ Undesignated statutory references are to the Penal Code.

misconduct during voir dire questioning and in closing argument, (3) trial counsel was ineffective for failing to object to the alleged misconduct, and (4) the court erred in imposing a \$60 section 1205 administrative fee. We shall strike the administrative fee and affirm the judgment as modified.

FACTUAL BACKGROUND

Tami F. met defendant in the 1980's, started dating him in 1996, and lived with him since 1997. They lived together in Placerville in 2017.

On March 4, 2017, defendant and Tami got into an argument over money his family owed her. Defendant was in the kitchen cooking; he had a knife at one point during the argument. According to Tami's testimony, defendant pointed a knife at her and, while he was three to four feet away, said, "I can kill you." Tami subsequently came to realize defendant was angry with people they had spoken with earlier and had said he would kill a person if that person approached Tami. Tami thought she was probably upset but not afraid when defendant pointed the knife at her. Later, when she took a bath to calm down, Tami saw the knife on an end table.

Tami testified to having 15 cans of light beer that night. She had also taken her numerous medications, most of which were not supposed to be consumed with alcohol. When she mixes alcohol and her medications, Tami tired easily and saw and heard things that may not have happened. Tami had told a defense investigator that she did not know whether the incident had in fact taken place.

A 911 call from Tami was admitted into evidence. Tami had called 911 and told the operator that "my boyfriend is threatening me." She additionally said, "[H]e had a knife to my throat and he threatened to kill me."

Tami told an officer responding to the call that defendant pulled a knife on her and threatened to kill her. Defendant was about two feet away from Tami when he pulled the

knife and made the threat. She was in fear of great bodily injury at the time. Tami displayed some signs of slight intoxication; she was emotional and cried intermittently during the interview. She was afraid of what would happen if defendant was arrested because he would be mad “once he was released from custody.”

The interviewing officer believed Tami’s concerns arose from the repercussions that would arise when defendant was released from custody. She asked the officer not to take defendant to jail. Defendant admitted to the officer that he had waived a knife around and told Tami he was going to kick her ass. Defendant, who was extremely intoxicated, was more intoxicated than Tami.

Tami’s father picked her up later that evening. She definitely had been drinking. Tami told her father defendant threatened her with a knife. She repeatedly told her stepmother, “He held a knife to my throat. He threatened to kill me. I want to kill him. He keeps throwing the dog, Dino, in my face.” Tami’s stepmother observed Tami was “[v]ery drunk” at the time.

DISCUSSION

1.0 Excluding Evidence of the Victim’s Medical History

1.1 *Additional Background*

Before trial, defense counsel gave the prosecution Tami’s medical records, which indicated she checked herself into a medical facility a few months after the crime, where she was diagnosed with depression, alcohol dependence, and anxiety disorder. The records further indicated she had good focus, memory, and concentration, and had told her doctor she had suffered abuse from her ex-boyfriend.

The prosecution moved in limine to impeach Tami with the statement to her doctor that she had been abused by her ex-boyfriend, and to exclude the other medical records pursuant to Evidence Code section 352. At the hearing on the in limine motion,

defense counsel asserted the diagnoses were relevant to Tami's credibility. Counsel admitted he would not call an expert witness to explain the relationship between the diagnoses and Tami's credibility.

The trial court allowed Tami's statement about the attack to her doctor but excluded the other medical records under Evidence Code section 352, finding them to have minimal relevance and considerable negative impact on the prosecution case.

When questioning Tami on direct examination, the prosecutor questioned her about statements she made to a doctor at a hospital in July 2017. Tami denied telling the doctor she had suffered abuse at the hands of her ex-boyfriend. Tami claimed that her father said this to the woman who admitted her to the hospital.

1.2 *Analysis*

Defendant contends the trial court erred because the medical records corroborated Tami's testimony regarding the medications she took that evening. He also argues the medical records should have been admitted under the rule of completeness, to give context to the statement she made to the doctor, and to assess her medical and physical condition at the time she made the statement. We disagree.

“ ‘Relevant evidence’ means evidence, including evidence relevant to the credibility of a witness . . . , having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” (Evid. Code, § 210.) The trial court may not admit irrelevant evidence but has broad discretion in determining whether evidence is relevant. (*People v. Babbitt* (1988) 45 Cal.3d 660, 681.) It also has discretion to exclude even relevant evidence under Evidence Code section 352 “if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” (Evid. Code, § 352.) “A

trial court's exercise of discretion in admitting or excluding evidence is reviewable for abuse [citation] and will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.” (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

California's rule of completeness is codified in Evidence Code section 356, which states, “Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence.”

Evidence Code section 356 is the statutory version of the common law rules, which is summed up thusly: “ ‘ “[T]he opponent, against whom a part of an utterance has been put in, may in his turn complement it by putting in the remainder, in order to secure for the tribunal a complete understanding of the total tenor and effect of the utterance.” ’ ” (*People v. Parrish* (2007) 152 Cal.App.4th 263, 269, fn. 3.) The purpose of the rule “is to prevent the use of selected aspects of a conversation, act, declaration, or writing, so as to create a misleading impression on the subjects addressed. [Citation.] Thus, if a party's oral admissions have been introduced in evidence, he may show other portions of the same interview or conversation, even if they are self-serving, which ‘have some bearing upon, or connection with, the admission . . . in evidence.’ ” (*People v. Arias* (1996) 13 Cal.4th 92, 156.)

The California Supreme Court has “taken a broad approach to the admissibility of the remainder of a conversation under Evidence Code section 356.” (*People v. Clark* (2016) 63 Cal.4th 522, 600.) “ ‘ “In applying Evidence Code section 356 the courts do not draw narrow lines around the exact subject of inquiry. ‘In the event a statement admitted in evidence constitutes part of a conversation or correspondence, the opponent

is entitled to have placed in evidence all that was said or written by or to the declarant in the course of such conversation or correspondence, provided the other statements have some bearing upon, or connection with, the admission or declaration in evidence. . . .’ [Citation.]” ’ [Citation.] Further, the jury is entitled to know the context in which the statements on direct examination were made.” (*People v. Harris* (2005) 37 Cal.4th 310, 334-335, italics omitted.) However, “[Evidence Code] [s]ection 356 is indisputably ‘ “subject to the qualification that the court may exclude those portions of the conversation not relevant to the items thereof which have been introduced.” ’ ” (*People v. Williams* (1975) 13 Cal.3d 559, 565.) As with Evidence Code section rulings, we review the trial court’s determination of whether to admit evidence under Evidence Code section 356 for abuse of discretion. (See *People v. Pride* (1992) 3 Cal.4th 195, 235.)

Tami’s mental health diagnosis in July 2017, four months after the incident, is minimally relevant to her credibility and cumulative when considered together with the less prejudicial credibility evidence that was considered by the jury. Tami testified to drinking a large amount of alcohol on the night of the incident, and to consuming drugs that, in combination with the alcohol, diminished her perception. Multiple witnesses who were with her that night testified to her intoxication. Her diagnoses of depression, alcohol dependency, and anxiety four months after the event do not necessarily bear on her ability to remember, perceive events accurately, or testify truthfully, whereas her intoxication directly bears on her ability to remember and perceive the events she experienced when intoxicated. This at best minimally relevant evidence also had the potential to prejudice the jury by leading them to judge Tami on her mental health rather than her credibility. Therefore, it ran a real risk of prejudicing the prosecution, as the trial court accurately observed. It was no abuse of discretion to exclude such evidence.

Evidence Code section 356 does not support a different result. Tami’s mental health diagnoses was not part of her statement to the doctor that defendant attacked her,

and it was not relevant to that statement. Allowing Tami to be questioned about her statement to the doctor without admitting the doctor's diagnosis does not take her statement out of context. There was no abuse of discretion here.

2.0 Prosecutorial Misconduct

2.1 Additional Background

Near the beginning of jury voir dire, defense counsel asked the jury: "Now, a lot of domestic violence cases we see, we see something called recanting. So people call the police. They say, 'Hey, domestic violence just happened.' And then when it comes to trial or if it comes later in the proceedings, that person recants. [¶] Does anyone think that, if someone recants, they're automatically lying or they are less trustworthy that way?" None of the prospective jurors indicated that they did.

Later, defense counsel asked: "Now, in some of these types of cases in domestic violence, the alleged victim comes in and says she wants the charges dropped. Would that have an effect on anybody's deliberations today? Would that sway their vote or their deliberations more towards [defendant] or against it? Does anyone have an opinion on that?" Prospective juror No. 1 wanted to hear more about why the victim wanted the charges dropped.

Counsel asked if anyone else had an opinion, and prospective juror D. (D.) replied: "Um, I think that it's very common for couples that get into domestic violence situations to change their minds, be it they don't want to deal with the repercussions of hurting that person or they have children involved or they have finances or the house or any multiple number of reasons, they say it's just easier not to deal with the court." D. said this would have no effect on her deliberation of the case, as she would consider all of the evidence.

When the prosecutor began voir dire, he stated to D.: "you actually stole some of my thunder for how I was going to do direct questioning here, but you brought up, in

response to one of [defense counsel]'s questions, that you said it was common for domestic violence victims to essentially come forward and recant." D. believed this due to having "been in many, many, many, many situations. Many." As a result, she did not want to deal with the court system. The prosecutor then asked if the victim's desire not to prosecute the case would have any effect on deliberation. D. replied that it would not, and she would consider all of the evidence.

The prosecutor continued with this theme during the voir dire of other prospective jurors. The prosecutor asked the panel whether any member agreed with D. that one should focus on the evidence rather than the victim's personal beliefs about whether the case should be prosecuted. Later, the prosecutor asked a prospective juror, "Did you agree with Ms. [D.] and her comments about it being common for victims of domestic violence sometimes to not want to go through the court system and want prosecution?" Soon after this question, the prosecutor asked another prospective juror, "And what about Ms. [D.]'s comments about, you know, common for victims to not want to go through with the court process[?]"

The prosecutor then asked a question regarding defense counsel's statement about victims recanting, "And what about what [defense counsel] stated earlier about recanting or, in other words, coming to court and saying it either didn't happen or minimizing what happened?· Would you be able to listen to that kind of testimony and still evaluate all the evidence in the case to see if what's charged happened?" This was followed up with the question, "What I mean is are you just going to—once the victim testifies and minimizes or denies, are you just going to shut it out and say 'Okay. Not guilty' or 'Guilty,' or are you going to look at all the evidence?"

Later, the prosecution's questions presumed Tami was the victim, beginning a question with the phrase, "So, presumably, the victim in this case, Tami [F.], is going to

testify” The prosecutor also twice began questions to prospective jurors with statements that the victim in this case was a female.

D.’s statement was brought up in other voir dire questions from the prosecutor. On several occasions, the prosecutor began questions by asserting D. said it was common for domestic violence victims to not press charges or deny it happening. Another juror was asked: “Did you agree with Ms. [D.]’s comments, though, this morning about what she was saying in her experience of it being a commonality that this goes on—it’s sometimes referred to as a cycle of violence—but for a victim of domestic violence to recant, as [defense counsel] said, or deny or minimize?”

Other questions asked prospective jurors if they could disregard a victim’s recanting. For example, the prosecutor asked, “Can you put aside the fact that a victim might come to court and minimize and deny and just look at all the evidence and whether I’ve proved my case?” Similarly, one juror was asked, “Can you look at the totality of the evidence in this case, even if the victim comes to court and recants or denies?” and another was asked, “Would you be able to put aside the fact that a victim is denying what happened and still find [defendant] guilty if you find evidence beyond a reasonable doubt?”

The prosecutor returned to the theme of the victim recanting in closing argument, stating: “And, unfortunately, it’s as we discussed in jury selection and what I promised each of you that you would see in this case, which is a victim who, due to the cycle of violence, is either so terrified of [defendant] or in love with him, or for a myriad of other reasons, as Ms. [D.] discussed and as you all mentioned or added on to in our discussions, affected her. So she’s come to court and minimized them.” Soon after, the prosecutor argued, “And as we know from our discussions in jury selection and people’s personal experiences, including Ms. [D.], there is this concept of the cycle of violence.”

Defense counsel did not object to any of the prosecutor's statements on voir dire or to the arguments recounted above.

2.2 *Analysis*

Defendant asserts the prosecutor's voir dire questions and argument regarding prospective juror D.'s statement, the frequency of victims denying the incident or minimizing it, and the concept of the cycle of violence constituted misconduct. He claims the allegedly improper voir dire questions mischaracterized D.'s or defense counsel's statements about victims recanting and minimizing and improperly indoctrinated the jury. He further claims the prosecutor's argument relied on facts not proven at trial.

"The applicable federal and state standards regarding prosecutorial misconduct are well established. ' "A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.' " ' [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ' " "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' " ' [Citation.] As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.] Additionally, when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

Defendant's failure to object to the prosecutor's statements during voir dire and in closing argument forfeits the contention on appeal. Anticipating this, he further contends the failure to object constitutes ineffective assistance of trial counsel.

A criminal defendant has the right to the assistance of counsel under both the Sixth Amendment to the United States Constitution and article I, section 15 of the California Constitution. (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.) This right "entitles the defendant not to some bare assistance but rather to *effective* assistance. [Citations.] Specifically, it entitles him [or her] to 'the reasonably competent assistance of an attorney acting as his [or her] diligent conscientious advocate.' " (*Ibid.*) The burden of proving a claim of ineffective assistance of counsel is squarely upon the defendant. (*People v. Camden* (1976) 16 Cal.3d 808, 816.)

" 'In order to demonstrate ineffective assistance of counsel, a defendant must first show counsel's performance was "deficient" because his [or her] "representation fell below an objective standard of reasonableness . . . under prevailing professional norms." [Citations.] Second, he [or she] must also show prejudice flowing from counsel's performance or lack thereof. [Citation.] Prejudice is shown when there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ' " (*In re Harris* (1993) 5 Cal.4th 813, 832-833.)

We recognize it is not " 'a function of the examination of prospective jurors to educate the jury panel to the particular facts of the case, to compel the jurors to commit themselves to vote a particular way, to prejudice the jury for or against a particular party, to argue the case, to indoctrinate the jury, or to instruct the jury in matters of law.' [Citation.] . . . On the other hand, a question fairly phrased and legitimately directed at obtaining knowledge for the intelligent exercise of . . . challenges may not be excluded merely because of its additional tendency to indoctrinate or educate the jury." (*People v.*

Williams (1981) 29 Cal.3d 392, 408, fn. omitted, disapproved on other grounds as stated in *People v. Fuiava* (2012) 53 Cal.4th 622, 654 [Prop. 115]; see *People v. Mendoza* (2000) 24 Cal.4th 130, 168 & fn. 5 [applying *Williams* in context of Prop. 115, which limited voir dire to establish challenges for cause].)

The voir dire questions defendant now objects to were all related to an appropriate line of inquiry during voir dire, whether the jurors could consider all of the evidence and not reject the prosecution's case simply because the alleged victim disavows or minimizes the crimes defendant was charged with committing against her. Any argument, indoctrination, or education in the prosecutor's questions and statements during voir dire was incidental to this purpose and did not constitute misconduct through improper questioning.

"Counsel's failure to make a futile or unmeritorious motion or request is not ineffective assistance." (*People v. Szadzewicz* (2008) 161 Cal.App.4th 823, 836.) Since any objection to the questions would have been futile, the failure to object was not ineffective assistance.

A prosecutor is given wide latitude during closing argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, including reasonable inferences or deductions to be drawn therefrom. During a jury summation, counsel may state matters not in evidence but which are common knowledge or are illustrations drawn from common experience. (*People v. Hill* (1998) 17 Cal.4th 800, 819.)

The prosecutor's references to prospective juror D.'s statement and the cycle of violence during closing argument assert the victim minimized and recanted from her original complaint because she was afraid of retaliation from defendant or still in love with him. There was evidence at trial that the victim repeatedly told law enforcement she did not want defendant arrested because he would be mad when released. The responding officer testified that the victim said this out of fear of repercussions if

defendant was arrested. The fact that a witness is afraid to testify or fears retaliation is relevant to credibility. (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1084.)

The prosecutor's arguments regarding not testifying out of fear are a fair commentary on the evidence of the victim's fear of retaliation. While there was no direct evidence of the victim still loving defendant, it is reasonable to draw the inference for the jury that this was also a motive for the victim to minimize or deny the crimes of a man with whom she had been living in a romantic relationship for 20 years at the time of the incident. Such commentary was proper and the failure to object to it was not ineffective assistance. While prospective juror D.'s statement was not evidence and there was no expert evidence on the cycle of violence in domestic violence cases, these references were incidental to the main, proper point of the argument. In light of the considerable evidence of guilt, the 911 call, the victim's statements to her parents, her doctor, and to law enforcement, and defendant's own statement regarding the incident, these incidental references could not prejudice the jury as defined in *Strickland*. (See *Strickland v. Washington* (1984) 466 U.S. 668, 684-685 [80 L.Ed.2d 674, 691-692].) There was no ineffective assistance here.

3.0 Administrative Fee

The trial court imposed a \$60 section 1205 administrative fee. Defendant contends the trial court erred, as the fee should be \$30 because there is no evidence he was subject to an installment plan for the payment of fines.

Section 1205 states in pertinent part: "(c) This section applies to any violation of any of the codes or statutes of this state punishable by a fine or by a fine and imprisonment. [¶] . . . [¶] (e) The defendant shall pay to the clerk of the court or the collecting agency a fee for the processing of installment accounts. This fee shall equal the administrative and clerical costs, as determined by the board of supervisors, or by the

court, depending on which entity administers the account. The defendant shall pay to the clerk of the court or the collecting agency the fee established for the processing of the accounts receivable that are not to be paid in installments. The fee shall equal the administrative and clerical costs, as determined by the board of supervisors, or by the court, depending on which entity administers the account, except that the fee shall not exceed thirty dollars (\$30). [¶] (f) *This section shall not apply to restitution fines and restitution orders.*” (Italics added.)

“Accordingly, section 1205, subdivision (e) limits those fees collected for processing of accounts receivable that are *not* to be paid in installments to \$30. In contrast, section 1205, subdivision (e) does not provide a specific limit on the fees collected for installment accounts.” (*People v. Soto* (2016) 245 Cal.App.4th 1219, 1232 (*Soto*).)

The trial court imposed one fine, a \$600 section 1202.4 restitution fine, imposed and stayed execution of a \$600 section 1202.44 probation revocation fine, and imposed no other fines in this case. The section 1205, subdivision (e), fee applies only in cases involving the imposition of fines other than the restitution fine. The only fine actually imposed was the restitution fine which was not subject to the section 1205 administrative fee. While the parole revocation fine was also imposed, since execution was suspended, the fee does not apply as no administrative cost is incurred for a probation revocation fine and defendant is not punished by the fine until the stay on execution is lifted if probation is revoked.

Since defendant was not subject to a fine covered by section 1205, the fee was unauthorized. Although defendant did not raise this contention below or on appeal, an unauthorized fee is not subject to forfeiture (*Soto, supra*, 245 Cal.App.4th at pp. 1232-

1233) and can be raised at any time (*People v. Scott* (1994) 9 Cal.4th 331, 354). We shall modify the judgment accordingly.²

DISPOSITION

The judgment is modified to strike the \$60 Penal Code section 1205 administrative fee. As modified, the judgment is affirmed. The trial court is directed to issue a new order of probation reflecting the modified judgment and to forward a certified copy to any necessary authorities.

s/BUTZ, Acting P. J.

We concur:

s/DUARTE, J.

s/RENNER, J.

² Because the law is clear on this point, we decide the issue without seeking further briefing. However, any aggrieved party may petition for rehearing. (Gov. Code, § 68081.)